the Appendix of Appellants filed separately by Petitioners commencing at page 13a and ending at 14a. It is reported in 246 F. Supp 1.

JURISDICTION

Petitioners timely filed their petition for Writ of Certiorari pursuant to the Rules of this Court.

QUESTIONS PRESENTED

Respondent accepts petitioners' question whether their causes of action are barred by the Michigan Statute of Limitations?

Respondent denies that there are any constitutional provisions involved.

STATEMENT

Respondent adopts petitioners' statement of the case with the exception that petitioners did not commence "* * * their action on February 14, 1964, * * *." They merely filed their complaints and had summonses issued February 14, 1964, but failed to turn copies over to the United States Marshall for service.

ARGUMENT

The opinion of the Court of Appeals, *Sylvester v. Messler*, 351 F. 2d 472, and the opinion of the trial court, *Sylvester v. Messler*, 246 F. Supp. 1, and petitioners' application for writ of certiorari clearly reflect that there are no special or important reasons that support the instant petition for writ of certiorari.

The syllabus in *Sylvester v. Meisler*, 246 F. Supp. 1, succinctly states the applicable rules of law as follows:

> "In determining whether a state statute of limitations has been tolled a federal court in diversity must apply the same rule as the local court would apply, at least where it is integral part of the statute."
>
> "Definite procedure prescribed for tolling Michigan statute of limitations is integral part of statute and must be applied by federal court in diversity case."

The various decisions on this point are dealt with at length in *2 Moore's Federal Practice* §3.07 (4-3-1) (2nd ed. 1962), where it is pointed out that the controlling case is *Ragan v. Merchants Transfer and Warehouse Co.*, (1949) 337 U.S. 530. It involves a Kansas statute of limitations and stands for the proposition that in diversity cases involving non-federal actions there should be no difference in result when the action is brought in the federal court from what it would be in the state court. *Moore, supra,* further points out that the weight of authority since *Ragan* has followed this rationale. There are cases wherein some lower federal courts have refused to follow the state rule by distinguishing the *Ragan* case on the basis that the particular state rule involved was not an integral part of that state's statute of limitations. This latter line of cases is criticized in *Moore's Federal Practice* on the basis that the *Ragan* case was not primarily decided on the premise that the state law involved was an integral part of the Kansas statute of limitations but on the broader premise that a different result should not concur in the federal court than would occur in the Kansas state court. See also *1 Barron & Holtzoff*, Federal Practice & Procedure §163 (Wright ed. 1960).

In any event, the instant case clearly involves a situation where the Michigan law governing the steps necessary to commence an action and effectively toll the statute of limitations is an integral part of the Michigan statute of limitations. Mich. Stat. Ann., 1962 Rev., 27A 5856. This statutory provision is quoted in full in the Appendix for Appellants on page 14a.

None of the cases cited in petitioners' brief in their Appendix are applicable. *Mahan v. Ohio Auto Rentals Co.*, (S. D. Ohio, W. D., 1962) 207 F. Supp. 383, and *Hagy v. Allen* (E. D. Kentucky, 1957) 153 F. Supp. 302, distinguish the *Ragan* case on the basis that the court did not feel that the state rule regarding the commencement of a cause of action was an integral part of that state's statue of limitations. It is interesting to note that in each of these cases the court was dealing with the rather strict provisions of a Kentucky statute which provided only one year within which to bring a cause of action for personal injuries. The case of *Isaacks v. Jeffers,* (C. C. A. 10th, 1944) 144 F. 2nd 26, was decided prior to *Ragan* and therefore is not controlling.

It must be further noted that even if the instant cases involved a federally created cause of action and which would then come under the purview of Rules 3 and 4 (a) of the Federal Rules of Civil Procedure, there is still a question of whether the Plaintiff-Appellants' actions in the instant case would be sufficient to toll the statute of limitations under the federal law. It has been pointed out by the cases involving federally created rights that a plaintiff must not only file his complaint under Rule 3 but must also have summons issued and have said summons and complaint placed in the hands of the United States Marshal for service pursuant to Rule 4 (a) in order to commence

his action. *Bomar v. Keyes,* (C.C.A. 2nd, 1947) 162 F. 2nd 136, certiorari denied 332 U.S. 825; *Hukill v. Pacific and A. R.&N. Co.,* (D.C. Alaska, 1958) 159 F. Supp. 571; 1 *Barron & Holtzoff, Federal Practice and Procedure* §163 (Wright ed. 1960).

Initially petitioners questioned the trial court's application of the statute of limitations of Michigan which is 3 years rather than the Florida statute of limitations which is 4 years. If this question is given consideration, then Defendant-Appellee points out the well established rule of law in diversity cases involving non-federal questions that the federal court must apply whatever statute of limitations the court of the forum state would apply. *Wells v. Simonds Abrasive Co.,* (1953) 345 U.S. 514; 2 *Moore, Federal Practice* §307 (2) (2nd ed. 1962); *Maki v. George R. Cooke Co.,* (C.C.A. 6th, 1942) 124 F. 2nd 663. Likewise, it can scarcely be questioned that the conflicts of law rule adhered to in Michigan requires that the Michigan statute of limitations be applied when Michigan is the forum state. *Home Life Insurance v. Elwell,* 111 Mich. 689; *Beldwin v. Blackman,* 118 Mich. 448 and 124 Mich. 667; *Millar v. Hilton,* 189 Mich. 635; *Tocco v. Time, Inc.,* (E.D. Mich. S.D., 1961) 195 F. Supp. 410; *Restatement, Conflict of Laws,* §603.

Moreover, as pointed out in the lower court's opinion (14a) Michigan has adopted the Uniform Statute of Limitations on Foreign Claims Act and incorporated it as an integral part of the Michigan Statute of Limitations. Mich. Stat. Ann., 1962 Rev., Sect. 27 A.5861. It should be noted that the Uniform Statute of Limitations on Foreign Claims Act was in full effect in Michigan at the time Plaintiffs-Appellants filed their complaints. This statute expressly provides that the period of limitation applicable to a claim accruing outside of Michigan shall be either that prescribed

by the law of the place where the claim accrued or by the law of Michigan, whichever bars the claim.

Petitioners question the interpretation by the Court of Appeals of *Hanna v. Plumer,* 380 U.S. 460. The respondent argued that *Hanna* neither overruled nor changed the rule of law expressed in *Ragan.* Briefly, this argument is predicated on a distinction of facts and difference between the Michigan statute of limitations from the one in effect in Massachusetts. The Court of Appeals agreed with respondent in the following language:

> "We have examined the opinion of Chief Justice Warren in *Hanna v. Plumer,* 380 U.S. 460 (1965), and conclude that although it refers to and cites *Ragan,* it carefully refrains from overruling same. The instant case appears to us to be directly governed by *Ragan.*"

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. EGGENBERGER,
1505 Dime Building,
Detroit, Michigan 48226,
Counsel for Respondent.